INDEX

	Page
Opinion below	1
Jurisdiction	2
Statute involved	2
Question presented	3
Statement	3
Summary of argument	6
Argument:	
I. Section 3 prohibits sales made with predatory intent at prices so low as to lack a rational foundation in the seller's costs, market conditions, business prospects or exigencies, or other circumstances facing the seller of a kind that an ordinary businessman in the seller's position, but without predatory intent, would take into consideration	11
A. Background and purpose of Section 3	12
B. Analysis of Section 3	18
II. Section 3, as thus construed, is sufficiently definite and certain to satisfy the requirements of the Fifth Amendment, at least as applied to sales below the seller's own costs as charged in the indictment	22
A. The meaning of a statute may be ascertained by reference to its history and context	25

654954—62——1

Argument—Continued
II. Section 3, etc.—Continued
B. A statute may constitutionally incorporate by reference a business standard familiar to persons affected by the legislation and readily ascertainable by judge and jury 26
C. The business practices and standards taken up by Section 3 are sufficiently ascertainable and definite, at least applied as to sales below costs, to satisfy the requirements of the Fifth Amendment 30
III. Since Section 3 is constitutional as applied to the sales below cost charged in the indictment, there is no occasion to consider its constitutionality as applied to other situations 43
Conclusion 52

CITATIONS

Cases:

Alabama State Federation of Labor v. *McAdory*, 325 U.S. 450 44
American Tel. & Tel. Co. v. *United States*, 299 U.S. 232 ..... 9, 25, 33
American Tobacco Co. v. *United States*, 328 U.S. 781 13
Bandini Petroleum Co. v. *Superior Court*, 284 U.S. 8 ..... 27, 33
Barrows v. *Jackson*, 346 U.S. 249 44
Ben Hur Coal Co. v. *Wells*, 242 F. 2d 481 38
Blackwood v. *United States*, 138 F. 2d 461 46
Boyce Motor Lines, Inc. v. *United States*, 342 U.S. 337 ..... 22, 23, 27, 42
Braatelien v. *United States*, 147 F. 2d 888 48

Cases—Continued

	Page
Bryan v. *United States*, 147 F. 2d 888	48
Champlin Refining Co. v. *Corporation Commission*, 286 U.S. 210	48
Cline v. *Frink Dairy Co.*, 274 U.S. 445	34
Connally v. *General Construction Co.*, 269 U.S. 385	35, 36, 37
F. & A. Ice Cream Co. v. *Arden Farms Co.*, 98 F. Supp. 180	31, 40
Federal Trade Commission v. *Anheuser-Busch, Inc.*, 363 U.S. 536	15
Hague v. *C.I.O.*, 307 U.S. 496	50
Hygrade Provision Co. v. *Sherman*, 266 U.S. 497	23
International Harvester Co. v. *Kentucky*, 234 U.S. 216	33, 34
Jordan v. *DeGeorge*, 341 U.S. 223	27
Land v. *United States*, 177 F. 2d 346	47
Lanzetta v. *New Jersey*, 306 U.S. 451	48, 50
Lovell v. *Griffin*, 303 U.S. 444	50
McCoy v. *United States*, 169 F. 2d 776, certiorari denied, 335 U.S. 898	46
McGowan v. *Maryland*, 366 U.S. 420	28
Miller v. *Oregon*, 273 U.S. 657	33
Moore v. *Mead's Fine Bread Co.*, 348 U.S. 115	15
Nash v. *United States*, 229 U.S. 373	8, 25, 32, 34, 37
Porto Rican American Tobacco Co. v. *American Tobacco Co.*, 30 F. 2d 234	13
Ratner v. *California*, 321 U.S. 755	9, 27, 33
Robinson v. *United States*, 324 U.S. 282	44, 49
Small Co. v. *American Sugar Refining Co.*, 267 U.S. 233	8, 29, 33
Sproles v. *Binford*, 286 U.S. 374	9, 21, 22, 28, 33
Standard Oil Co. v. *United States*, 221 U.S. 1	13
Stirone v. *United States*, 361 U.S. 212	48
Thornhill v. *Alabama*, 310 U.S. 88	50

Cases—Continued

	Page
United Public Workers v. *Mitchell*, 330 U.S. 75	44
United States v. *American Tobacco Co.*, 221 U.S. 106	13
United States v. *Borden Co.*, 308 U.S. 188	51
United States v. *Cohen Grocery Co.*, 255 U.S. 81	28, 33
United States v. *Corn Products Refining Co.*, 234 Fed. 964	13, 39
United States v. *Fruehauf*, 365 U.S. 146	44
United States v. *Glasser*, 116 F. 2d 690, modified, 315 U.S. 60	48
United States v. *Halseth*, 342 U.S. 277	48
United States v. *Harriss*, 347 U.S. 612	26, 44
United States v. *Leiner*, 143 F. 2d 298	33
United States v. *Lem Hoy*, 330 U.S. 724	48
United States v. *Minneapolis Electrical Contractors' Ass'n*, 99 F. Supp. 75	46
United States v. *Neff*, 212 F. 2d 297	47
United States v. *Petrillo*, 332 U.S. 1	22, 38
United States v. *Ragen*, 314 U.S. 513	9, 22, 23, 27, 32, 43
United States v. *Raines*, 362 U.S. 17	44
United States v. *Shindler*, 173 F. Supp. 393	47
United States v. *Spector*, 343 U.S. 169	8, 25, 50
United States v. *Trenton Potteries Co.*, 273 U.S. 392	29
United States v. *Wise*, 370 U.S. 405	6
Winters v. *New York*, 333 U.S. 507	23

Constitution and Statutes:

U.S. Constitution:	
First Amendment	50
Fifth Amendment	9, 25, 37
Clayton Act, 38 Stat. 730, as amended, 15 U.S.C. 12, *et seq.*, Section 14	6
Criminal Appeals Act, 18 U.S.C. 3731	2, 51
Lever Anti-Profiteering Act, 40 Stat. 276, as amended	8, 28, 33

Constitution and Statutes—Continued

	Page
Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13, *et seq.*, Section 3	2, 3, 4, 6, 7, 10, 11, 12, 15, 16, 18, 19, 20, 22, 24, 30, 31, 35, 37, 38, 40, 41, 42, 43, 45, 51
Securities Act of 1933, 48 Stat. 74, as amended, 15 U.S.C. 77a *et seq.*, Section 17(a)(2)	47
Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1, *et seq.*	3, 6
Miscellaneous:	
Burns, *The Decline of Competition* (1936)	13
Clark, *Statutory Restrictions on Selling Below Cost*, 14 Vand. L. Rev. 165	41
80 Cong. Rec.:	
3112	16
3113	16
6332	16
6346	16
6348	17
9416	16
Edwards, *Maintaining Competition* (1949)	13
Federal Rules of Criminal Procedure, Rule 7(c)	46
Hale & Hale, *Market Power* (1969)	13
Hearings before a Subcommittee of the House Committee on Interstate & Foreign Commerce on H.R. 10235, 86th Cong., 2d Sess.	41
Hearings before a Subcommittee of the Committee on the Judiciary, United States Senate, on S. 4171, 74th Cong., 2d Sess.	7, 17
H. Rep. 627, 63d Cong., 1st Sess.	14
Machlup, *The Political Economy of Monopoly* (1952)	13
Restatement of Trusts, §§ 174, 227	21
Rowe, *Price Discrimination Under the Robinson-Patman Act* (1962)	13
S. 4171, 74th Cong., 2d Sess.	16
S. Rep. 1502, 74th Cong., 2d Sess.	16
Thorelli, *The Federal Antitrust Policy* (1955)	13

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 18

UNITED STATES OF AMERICA, APPELLANT

v.

NATIONAL DAIRY PRODUCTS CORP., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

BRIEF FOR THE UNITED STATES ON REARGUMENT

The questions raised during the initial argument and the order for reargument suggest the need for a more complete exposition of the government's views upon some of the issues mooted on this appeal. Accordingly this brief is submitted in place of the original brief on the merits filed by the United States.

OPINION BELOW

The district court rendered no opinion in dismissing the counts of the indictment charging violations of Section 3 of the Robinson-Patman Act. The court's oral statement, made when it granted the motion to dismiss those counts, is set forth at R. 121–122.

JURISDICTION

The counts of the indictment involved in this appeal were filed under Section 3 of the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13a. The order of the district court, dismissing these counts as based on an unconstitutional statute, was entered on March 20, 1961 (R. 122–123). The notice of appeal was filed on April 15, 1961 (R. 124–125); and probable jurisdiction was noted on October 9, 1961 (R. 126; 368 U.S. 808). The jurisdiction of this Court rests on the Criminal Appeals Act, 18 U.S.C. 3731. The order setting the case for reargument at the 1962 term was entered on April 2, 1962. 369 U.S. 833.

STATUTE INVOLVED

Section 3 of the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13a, provides as follows:

> *Discrimination in rebates, discounts, or advertising service charges; underselling in particular localities; penalties*
>
> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said

person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both.

QUESTION PRESENTED

Whether the provision of Section 3 of the Robinson-Patman Act making it a crime to sell goods at unreasonably low prices for the purpose of destroying competition, as applied to sales made below cost with such purpose, is unconstitutionally vague and indefinite.

STATEMENT

On September 16, 1959, the appellees were indicted in the United States District Court for the Western District of Missouri (R. 1–33). Eight counts (counts 1, 3, 5, 7, 9, 11, 12 and 14) charged National Dairy Products Corporation ("National") with conspiring to restrain trade in violation of Section 1 of the Sherman Act, 26 Stat. 209, 15 U.S.C. 1; seven counts (counts 2, 4, 6, 8, 10, 13 and 15) charged it with making sales below cost for the purpose of destroying competition, in violation of Section 3 of the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13a. Two of the Sherman Act counts (counts 11 and 12) and one of the Robinson-Patman Act counts (count

13) named Raymond J. Wise, a vice-president and director of National, as a codefendant.

The pertinent allegations of the indictment are as follows:

National is engaged in the business of purchasing, processing, distributing and selling milk and other dairy products throughout the United States (R. 1). For the past several years National, which has a milk processing plant in Kansas City, Missouri, has been in competition with national concerns and various small local dairies, both in the Greater Kansas City area and in a number of smaller cities and towns adjoining Kansas City in Kansas and Missouri (R. 4). Each of the local dairies has only a single bottling plant and, typically, annual sales not exceeding $300,000 (R. 4). A number of local dairies have sales of less than $100,000 and net assets of less than $50,000 (R. 4). Throughout the Greater Kansas City market, National distributes its products largely through its own employees, but in the cities and towns in Missouri and Kansas outside this market it usually sells its milk in paper cartons to independent distributors who, in turn, resell the milk on their own account (R. 4). During the period covered by the indictment, National did not normally bottle milk in glass containers for sale in stores (R. 4–5).

The indictment charged violations of Section 3 of the Robinson-Patman Act with respect to National's direct or indirect sales of milk in Kansas City and six local markets in Missouri or Kansas. It alleged that during stated periods National sold milk through its distributors (or, in the the case of the Greater

Kansas City market, directly) at unreasonably low prices for the purpose of destroying competition in the market in question (R. 9, 12, 15, 18–19, 22, 28–29, 32). In each market, National is charged with having "utilized the advantages it possesses by reason of the fact that it operates in a great many different geographical localities in order to finance and subsidize a price war against small dairies selling milk in competition with it * * * by intentionally selling milk [directly or to its distributor in the area] at prices below National's cost" (R. 10, 12, 15–16, 19, 22, 29, 32). The effect of such practices in two instances has been to "eliminate competition" and "to drive small dairies from" the market (R. 16, 32). In the other five areas, the actions of National have resulted in "severe financial losses to small dairies doing business" in the market and have caused them losses in sales volume (R. 9, 12, 19, 22, 29). In addition, the violations in the Greater Kansas City market (in which the defendant Wise participated as a principal (R. 28)), have forced some small dairies to request stores selling their products to refrain from advertising or selling them at low prices, in order to prevent National from starting a new price war (R. 29).[1]

[1] The Sherman Act counts charged violations relating to National's activities in the six specified local markets outside Greater Kansas City. It was alleged that in each case, during the same periods involved in the parallel Robinson-Patman Act counts, National's distributors were guaranteed a specific gross margin of profit, thus permitting the distributor to engage in price wars without risk of loss (see, *e.g.*, R. 7, 8); and that an objective and result of National's actions was to restrict or eliminate the sale of milk in glass gallon containers by the small dairies in these communities in competition with the milk sold by National or its distributors in paper cartons (*ibid.*).

On January 22, 1960, National moved to dismiss the seven Robinson-Patman Act counts on the ground that the statute is unconstitutionally vague; a similar motion was filed by the defendant Wise with respect to the Robinson-Patman Act count involving him. After hearing oral argument by the parties on March 6, 1961, the district court ruled from the bench that the statute "is so vague and indefinite as to violate the Constitutional provisions relating to due process" (R. 122), and dismissed counts 2, 4, 6, 8, 10, 13 and 15. The formal order of dismissal (R. 122–123) was entered on March 20, 1961.[2]

SUMMARY OF ARGUMENT

I

Section 3 of the Robinson-Patman Act forbids a business firm engaged in interstate commerce "to sell * * * goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor." In our view, a price is "unreasonably low" when, judged from the standpoint of the seller and according to the standards of the business community, it has no rational justification in existing or foreseeable business conditions other than the seller's desire to destroy competition or eliminate a competitor. A price which results in selling at a loss, accord-

[2] The district court subsequently dismissed counts 11 and 12 as to appellee Wise, on the ground that a corporate official may not be prosecuted under Section 1 of the Sherman Act for antitrust violations committed in his corporate capacity, but only under Section 14 of the Clayton Act. On appeal the judgment of dismissal was reversed, *United States* v. *Wise*, 370 U.S. 405.

ing to the seller's own methods of accounting, is unreasonably low by any normal business standard in the absence of some extraordinary, identifiable explanation.

That this is the meaning of the disputed phrase fairly and unambiguously appears from the words of Section 3, read in the light of its background and purpose. Antitrust history shows that this provision is an important part of the general body of antitrust law intended to preserve a competitive economy with opportunities for small businessmen. The provision is aimed at a well-known weapon of monopolists—predatory pricing—with a view to forbidding use of the monopolistic practice before competition has been further impaired. Although price discrimination is commonly associated with predatory pricing and is therefore the target of many related provisions of the Robinson-Patman Act, it is clear that the evil does not depend upon discrimination; and the words in question were intended to interdict it in the latter form. Thus, although the Senate hearings on the Borah-Van Nuys Bill were primarily concerned with discrimination, there was also testimony referring more broadly to sales at a loss made with the objective of destroying competition. *Hearings before a Subcommittee of the Committee on the Judiciary, United States Senate, on S. 4171*, 74th Cong., 2d Sess., pp. 85–86.

Since Section 3 is concerned with predatory tactics, not with assuring every seller a fair price, the "unreasonably low prices" are manifestly those which a rational business man would not set on his wares, hav-

ing in mind all the relevant factors that confront him; in other words, they are prices having no rational support in existing or foreseeable business conditions or other relevant considerations other than a predatory purpose. The question of reasonableness is to be answered from the standpoint of the seller. The considerations that are relevant are those which other sellers in the business community would take into account, when placed in the same situation.

II

The due process requirement that a statute give intelligible guidance to persons affected does not preclude reference to the statute's context in law and public policy as a guide to its meaning. This Court has frequently relied upon history and legal context for the purpose of ascertaining the meaning of criminal statutes attacked for vagueness. *E.g., Nash* v. *United States*, 229 U.S. 373, 377; *United States* v. *Spector*, 343 U.S. 169, 170–171.

It is also settled constitutional law that a statute may incorporate by reference the standards of the business community, or of an appropriate segment, without becoming void for vagueness. The vice in the use of the term "unjust or unreasonable rate or charge" in the Lever Anti-Profiteering Act was that "[t]here was no accepted and fairly stable commercial standard which could be regarded as impliedly taken up and adopted by the statute as this Court construed it." *Small Co.* v. *American Sugar Refining Co.*, 267 U.S. 233, 240–241.

Of course, the commercial standard must be sufficiently meaningful to guide both those subject to the regulation and also the courts and juries that apply it. We think that although borderline cases may arise, there would be no greater difficulty in identifying the relevant business factors, and then determining whether there was no rational relation between the low price and the business conditions confronting the seller, than there is under other statutes which the Court has sustained. *United States* v. *Ragen*, 314 U.S. 513 ("reasonable" allowances for salaries and compensation); *American Tel. & Tel. Co.* v. *United States*, 299 U.S. 232 ("reasonable charge"); *Sproles* v. *Binford*, 286 U.S. 374 ("the shortest practicable route"); cf. *Rattner* v. *California*, 321 U.S. 755 ("unreasonable speed"). The commercial factors which influence a seller's pricing policies are well known and readily identifiable. They include the seller's fixed costs per unit, the variable costs which may decline if the volume of sales increases, the risks of the business, whether the product is new or well-established, the prices of competitors, etc. To select a single figure as *the* right price may involve the exercise of too much judgment for submission to a jury, but there is no such difficulty in deciding whether a price is so low, from the seller's own point of view, that it lacks any rational foundation except the impermissible purpose of destroying competition or eliminating a competitor.

Even if there be doubt as to whether the commercial standard to which the Act refers is sufficiently precise to satisfy the Fifth Amendment in all its possible ap-

plications, Section 3 is plainly constitutional in its application to the conduct with which appellees are charged—sales at prices below National's own costs. *Prima facie* such prices are unreasonably low from the seller's own point of view. No businessman would accept them, absent an intent to destroy competition, unless some specific justification were demonstrated, such as an opportunity to build up volume to the point where unit costs were reduced below the unit price or the need to dispose quickly of excess inventory or damaged goods. A jury is quite capable of ascertaining by reference to commercial practice whether a defendant's explanation sets forth a rational business reason.

III

Appellees are not entitled to have the indictment dismissed merely upon showing that it is unconstitutionally vague as applied to sales above cost but at prices which might nonetheless be thought "unreasonably low." Appellees are charged with sales at less than National's own costs, without reasonable justification. Unless the government proves this misconduct, there must be an acquittal upon the Robinson-Patman counts. Section 3 gives the plainest notice that this misconduct is unlawful. By impliedly incorporating a commercial standard it also supplies judges and juries with an entirely workable test for determining whether the sales below cost were at unreasonably low prices. Both the notice and the standard are derived from the statute. This is sufficient for present purposes. Appellees cannot invalidate a statute the meaning of which is clear and definite as

applied to them, by showing that as applied to someone else, or to some hypothetical conduct, it may be unconstitutional.

ARGUMENT

I

SECTION 3 PROHIBITS SALES MADE WITH PREDATORY INTENT AT PRICES SO LOW AS TO LACK A RATIONAL FOUNDATION IN THE SELLER'S COSTS, MARKET CONDITIONS, BUSINESS PROSPECTS OR EXIGENCIES, OR OTHER CIRCUMSTANCES FACING THE SELLER OF A KIND THAT AN ORDINARY BUSINESSMAN, IN THE SELLER'S POSITION, BUT WITHOUT PREDATORY INTENT, WOULD TAKE INTO CONSIDERATION

The crime defined by Section 3 of the Robinson-Patman Act has three elements: (1) a sale of goods, (2) at "unreasonably low" prices, (3) made for the purpose of destroying competition or of eliminating a competitor from the market.

The meaning of the first and third elements is too plain for discussion. Under the second element the critical question, in our view, is whether an ordinary businessman, who was in the position of the seller and concerned only with his interests, but who had no predatory intent, would say that the price was "unreasonably low." The question of reasonableness is to be answered from the viewpoint of the seller. The standard to be applied is that of the business community. A price is "unreasonably low" under Section 3 when, judged from the standpoint of the seller and according to the standards of the business community, it has no rational justification in existing or foreseeable business conditions, apart from the seller's desire to destroy competition or eliminate a competitor. And a price below the seller's own costs

is unreasonably low, by any normal business standard, in the absence of some extraordinary, identifiable explanation.

That this is the meaning of the disputed phrase fairly and unambiguously appears from the words of Section 3 read in the light of its background and purpose.

A. BACKGROUND AND PURPOSE OF SECTION 3

Section 3 of the Robinson-Patman Act is an important part of the general body of antitrust law intended to preserve a competitive economy with opportunities for small businessmen; it is aimed at a specific weapon of the monopolist—predatory pricing.

Predatory pricing—waging trade wars designed to discipline overzealous competitors or drive them from the market by selling at prices that cause losses ruinous to the small firm, but which the large can absorb—is an especially effective, and hence an especially pernicious, method of destroying competition. A large firm with greater resources than its competitors may acquire a monopoly by selling at unremunerative prices so low as to drive into bankruptcy small competitors unable to absorb the losses, or else to force them to sell the business. In a market dominated by a few giants the smaller firms may be allowed to survive but forced to adhere to the prices and methods of distribution set by the leaders instead of attempting to capture more of the market by *bona fide* competition; in such cases the predatory price war is an effective disciplinary weapon. Such "acts and dealings," when they occur, are "wholly inconsistent with the theory" that the company has been engaged

in "advancing the development of business power by usual methods * * *"; "on the contrary [they] necessarily involved the intent to drive others from the field and to exclude them from their right to trade * * *." *Standard Oil Co.* v. *United States*, 221 U.S. 1, 76. See also Burns, *The Decline of Competition*, 8 (1936); Edwards, *Maintaining Competition*, 159 (1949); Hale & Hale, *Market Power*, 30–31 (1960); Machlup, *The Political Economy of Monopoly*, 147 (1952); Rowe, *Price Discrimination Under the Robinson-Patman Act*, 28 (1962); Thorelli, *The Federal Antitrust Policy*, 67 (1955).

The evil is illustrated in the reported decisions. In one of the early landmark Sherman Act cases, *United States* v. *American Tobacco Co.*, 221 U.S. 106, 160–161, this Court held that an inference that the company had intended to monopolize was justified by the fact, among others, that it had initiated price wars in which it sold below cost, as a result of which it sustained severe losses. See, also, *American Tobacco Co.* v. *United States*, 328 U.S. 781, 807. Similarly in *United States* v. *Corn Products Refining Co.*, 234 Fed. 964 (S.D.N.Y.), another early Sherman Act case, District Judge Learned Hand rested his conclusion that there was an illegal combination which had attempted "to drive out weaker competitors" (p. 1013) partly upon the proof that the principal defendant had sold below cost (pp. 989–990). See also, *Porto Rican American Tobacco Co.* v. *American Tobacco Co.*, 30 F. 2d 234, 237 (C.A. 2), holding that a seller violated Section 2(a) of the original Clayton Act by selling below cost in a particular market, pur-

suant to a "design and plan to put [its competitor there] out of business," using "some real or fancied wrong * * * as an excuse to proceed against and eliminate a weaker competitor." These cases are not legal precedents upon the present issue but they illustrate the evil at which the present law is aimed.

In 1914, when Congress sought to strengthen the antitrust laws and check monopoly in its incipiency by outlawing specific anti-competitive acts or practices, it gave explicit attention to predatory pricing. The House Committee report on the Clayton Act stated (H. Rep. 627, 63d Cong., 1st Sess., p. 8, emphasis added):

> Section 2 of the bill * * * is expressly designed with the view of correcting and forbidding a common and widespread unfair trade practice whereby certain great corporations and also certain smaller concerns * * * have heretofore endeavored to destroy competition and render unprofitable the business of competitors by selling * * * at a less price in the particular communities where their rivals are engaged in business than at other places throughout the country * * *. In the past it has been a most common practice of great and powerful combinations engaged in commerce * * * to lower prices of their commodities, *oftentimes below the cost of production*, in certain communities and sections where they had competition, with the intent to destroy and make unprofitable the business of their competitors * * *.

The 1936 Robinson-Patman amendments were designed to "strengthen the Clayton Act provisions"

(*Federal Trade Commission* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 543–544). Their dominant concern might fairly be said to be the injury to secondary line competition resulting from the discriminatory price reductions and other favors which chain stores and other large buyers were exacting from their suppliers—advantages which Congress believed enabled them to overwhelm their smaller competitors. But this was not the only purpose. The Robinson-Patman amendments were also designed to strengthen the weapons for dealing with price wars that injured primary line competitors. *Federal Trade Commission* v. *Anheuser-Busch, Inc., supra.* For example, as this Court stated in a case based in part upon Section 3 of the Robinson-Patman Act, "Congress by the Clayton Act and Robinson-Patman Act barred the use of interstate business to destroy local business" through predatory price-cutting by which "[t]he profits made in interstate activities would underwrite the losses of local price-cutting campaigns." *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115, 119, 120.

Obviously, price discrimination is not the only method of predatory pricing. A large firm may simply absorb losses for the period required to accomplish its purpose, counting upon future monopoly profits to more than offset the loss. Large firms are more often diversified than small business, and they can finance such trade wars out of the profits upon other products. Or the business may be of such a nature that local market conditions govern local prices to such a degree that when the powerful firm resorts to predatory pricing in one market and absorbs any

losses out of the profits in other markets, discrimination cannot be readily proved. The present case furnishes a fair example. The price of milk varies from locality to locality. The indictment alleges that National is engaged in the milk business "throughout the United States" (R. 1); that it sold below cost in seven specified markets for the purpose of destroying competition in each of those markets (R. 9, 12, 15–16, 19, 22, 28–29, 32); and that it "finance[d] and subsidize[d]" its "price war[s] against small dairies selling milk in competition with it" through its operations "in a great many different geographical localities" (*ibid.*).

Since the latter forms of predatory pricing are as dangerous to the economy as price-cutting accompanied by demonstrable discrimination, it would have been surprising if Congress had ignored them. The provision in Section 3 making it unlawful "to sell * * * goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor" reads directly on the evil and is apparently intended to outlaw it. Furthermore, although the original Robinson-Patman bill did not contain Section 3, the legislative history reveals that one of Section 3's chief aims was to strengthen, and thus to make more effective, the various prohibitions of the Clayton Act against geographic price discrimination, including the ban on predatory selling below cost. S. Rep. 1502, 74th Cong., 2d Sess., p. 4; 80 Cong. Rec. 3112, 3113, 6332, 9416; cf. *id.* at 6346.

Section 3 first appeared as part of a Senate bill (S. 4171), introduced by Senators Borah and Van

Nuys, and proposed by Senator Borah as an amendment to the original House bill (80 Cong. Rec. 6348). Much of the amendment overlapped provisions already in the Robinson-Patman bill but one of the substantive provisions that it obviously added was the prohibition now in dispute—a ban upon predatory price-cutting unaccompanied by discrimination. Thus, although the Senate hearings on the Borah-Van Nuys bill were primarily concerned with discrimination, there was also discussion relating to sales made at a loss with the objective of driving competitors out of business or otherwise injuring competition. *Hearings before a Subcommittee of the Committee on the Judiciary, United States Senate, on S. 4471*, 74th Cong., 2d Sess., pp. 14, 18, 64, 85–86.[3] And in the midst of a colloquy about "selling at less than cost," Senator Borah

[3] Thus, Edgar Watkins, attorney for the National Wholesale Grocers' Association, testified that the Borah-Van Nuys bill would fill a gap in the Robinson-Patman bill by prohibiting sales at less than cost for the purpose of destroying competition, under the language "proscribing" sales at "unreasonably low prices" (*id.*, 85–86):

"In further considering the language of this bill, there is a provision in it that seems to me to clearly warrant the suggestion here made about loss leaders. That is a very important subject. I believe it has done more to harm the small independent dealer than almost anything else. It is not covered in the so-called Robinson-Patman bill, and it should be covered. I believe that you have covered it with general language here about unreasonably low prices. When you make an unreasonably low price for the purpose of lessening or destroying competition—and that is the purpose of the loss leader—you can prohibit that by statute, so as to make it a violation of law."

Appellees argue that the reference is only to "loss leaders," but it is clear that witnesses throughout the hearings usually equated loss leaders with sales below cost.

himself stated that his bill was intended "to stop that" (*id.*, p. 53).

B. ANALYSIS OF SECTION 3

The function and meaning of the phrase "unreasonably low prices" in Section 3 become clear when one considers the problem facing a draftsman seeking to carry out the Congressional intention of outlawing all predatory pricing in specific terms instead of relying merely upon the general provisions of the Sherman Act. Simply to proscribe all sales "for the purpose of destroying competition or eliminating a competitor" would encompass the evil but was open to serious objections. One ultimate goal of antitrust policy is to provide purchasers the highest quality of goods at the lowest price. If Firm A has access to cheap raw materials and is so extraordinarily efficient that it can sell at a handsome profit at prices below its competitors' costs, the public should enjoy the benefit even though some of the competitors are eliminated. Had the words "at unreasonably low prices" been omitted from Section 3, Firm A would be in danger of prosecution; for if it knew the effect upon its competitors, it could hardly deny an allegation of purpose. Thus, the evident function of the quoted phrase is to eliminate the danger of outlawing *bona fide* price competition, by confining the prohibition to sales at prices which lack a reasonable economic justification—in other words, to confine it to sales at prices which are irrational or have only a predatory foundation. To accomplish this purpose Congress followed a practice used by legislatures and approved by courts in count-

less instances: it turned to the standards of ordinary reasonable men operating in the environment affected by the legislation, and prohibited sales with predatory intent at prices which are "unreasonably low."

When the function of the phrase "at unreasonably low prices" is kept firmly in mind, the questions concerning its meaning are easily answered. Whether a price is so low as to lack any reasonable economic justification (other than a predatory purpose) must be determined from the standpoint of the individual seller. The statute is not concerned with the buyer's appraisal. From his viewpoint no price is objectionably low, except as he may see the transaction through someone else's eyes. Nor are the costs or profits of other sellers relevant. Section 3 is not legislation designed to curtail price competition based upon efficiency of operation and thereby secure every firm a reasonable profit measured by some objective test. It is concerned, as shown above, with protecting the public against one of the familiar weapons of the monopolist. The test taking into account all three elements of the crime—is whether the seller fixed the price so low, with the specific intent to destroy competition or to eliminate a competitor, that the price has no rational foundation in the seller's costs, or in market conditions or other business exigencies facing the seller of the kind that would be taken into consideration by an ordinary businessman, in his position, lacking a predatory intention.

The elements of predatory intent and "unreasonably low prices" are often interrelated. A seller cannot be

heard to assert that his price is reasonable, from his own point of view, because selling at so low a price is a good way to destroy competition. Also, the proof which establishes the seller's predatory intent may be much the same as the proof that the price was unreasonably low. For example, the evidence in a given case might show that a large nationwide concern selling milk in a particular locality at the market price suddenly cut its price 25 percent to a point well below its own cost of production, as shown by its own books, shortly after several small local concerns had attempted to expand their sales in the market by offering trading stamps with home deliveries; and there might be further evidence negating any of the normal business justifications for the price reduction. This evidence would support a finding of a subjective intent to destroy competition because it shows a plausible motive and negates other explanations for the seller's conduct. The evidence would also justify a jury in finding that the price was unreasonably low by objective standards, *i.e.*, that even from the seller's own point of view it had no rational foundation in his costs or in market conditions or other business exigencies of the kind taken into account by an ordinary businessman without predatory intention. Nevertheless, the two elements serve distinct and important functions. Proof of the predatory intention will not establish a violation of Section 3 if the price yields a reasonable profit or is otherwise justified by normal business considerations. Conversely, even if the price is unreasonably low by objective standards, the defendant must be acquitted if the jury finds that his conduct is to be

explained not by a predatory intent but by an abnormal aberration such as a gross error in bookkeeping, a desire to make gifts to his customers, or an innate inability to tell whether the price cut was rational from the standpoint of his own business.

The factors compendiously summarized in Section 3 by the term "reasonable" are those which would be considered relevant by the business community, just as they are in determining whether a trucker has used "the shortest practicable route" (*Sproles* v. *Binford*, 286 U.S. 374, 380) or a trustee has exercised "reasonable care and skill" in the management of an estate *Restatement of Trusts*, §§ 174, 227). Similarly, the standard by which the reasonableness of the explanation for an unusually low price is to be judged is that of the business community. The trier of the facts will ask, first, what considerations might an ordinary businessman take into account that could explain or justify the price attacked as unreasonably low and, second, would such a man be satisfied by the proffered justification. Since it is only "*un*reasonably" low prices that statute proscribes, questions of degree would be resolved in favor of the seller. He would be acquitted unless his prices, made with a predatory intent, fell outside the range of what an ordinary businessman, acting as the seller, would consider reasonable under the same conditions.

We discuss in more detail at pages 30–32, 38–43 below the factors that an ordinary businessman would consider relevant, and the standards that he would apply, in determining whether a price is unreasonably low. Suffice it to say that it is common knowledge that

the business community unanimously holds that under normal conditions prices must be high enough to cover costs, and that in the absence of some special justification a price below the seller's own costs is unreasonably low. When no valid justification exists—and under the statute an intent to destroy competition cannot be a justification—sales below cost are also precisely the kind of anticompetitive practice that Congress considered to pose so serious a threat to our economy as to warrant the imposition of criminal penalties. For both reasons they plainly constitute sales at "unreasonably low prices" within the meaning of Section 3.

II

SECTION 3, AS THUS CONSTRUED, IS SUFFICIENTLY DEFINITE AND CERTAIN TO SATISFY THE REQUIREMENTS OF THE FIFTH AMENDMENT, AT LEAST AS APPLIED TO SALES BELOW THE SELLER'S OWN COSTS AS CHARGED IN THE INDICTMENT

The constitutional requirement of definiteness in criminal statutes serves several purposes: (1) it insures that persons will be given adequate warning of what conduct is criminal and thus enables them to conform their behavior to the requirements of the law; (2) it provides juries and judges with adequate standards for identifying the proscribed conduct and imposing criminal sanctions according to rule (*Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337, 340; *United States* v. *Petrillo*, 332 U.S. 1, 7; *United States* v. *Ragen*, 314 U.S. 513, 524; *Sproles* v. *Binford*, 286 U.S. 374, 393); and (3) by providing such a standard it ensures uniformity in the administration of justice in diverse circumstances and regions. The constitutional requirement is that there be a "reasonable de-

gree of certainty." *Boyce Motor Lines, Inc.* v. *United States, supra,* 342 U.S. at 340; *Winters* v. *New York,* 333 U.S. 507, 524–526 (Mr. Justice Frankfurter, dissenting). It is not only permissible but essential that an area of judgment be left to judge or jury in applying general standards to specific situations.

Section 3 is sufficiently definite to warn businessmen of what conduct is criminal. No businessmen reading Section 3 could have any doubt about whether the law forbade him to sell goods at prices below his own costs "for the purpose of destroying competition or eliminating a competitor." The requirement of a specific, evil intent immediately eliminates the danger that anyone will be convicted of crime merely because his prices are found too low by a court or jury. And one who sells his products at prices set low for a purpose so plainly inconsistent with our historic antitrust policy cannot honestly plead surprised innocence. In this respect the case is like *United States* v. *Ragen,* 314 U.S. 513, where the requirement of proof of an intent "to evade and defeat a tax" saved a prohibition against deducting more than a reasonable allowance for salaries, and *Hygrade Provision Co.* v. *Sherman,* 266 U.S. 497, where language that might otherwise have been too vague to support a criminal prosecution was confined by the further statutory requirement of proof of a specific intent to defraud.

Appellee's only answer at the initial argument was that "when the act prohibited is unascertainable, any requirement of intent becomes a nullity. No one can be held to intend something which is unknown and unknowable" (Br. p. 36). This misses the point

entirely. The intent required by Section 3 is not merely an intent to do the prohibited act; it is a specific intent to "destro[y] competition or eliminat[e] a competitor." One knows when he has such purpose.

We think it equally plain that a businessman knows that a price below the seller's own costs is "unreasonably low" in the absence of some specific and readily ascertainable explanation. The adequacy of the warning can be fairly tested by asking whether, quite apart from any law, top company officials would be satisfied with a regional manager who repeatedly sold goods at less than cost and when asked for an explanation replied, "Why, I'm surprised. We're not making money on the sales, and there's no special reason for selling below cost; but I just never supposed that you would consider prices below our costs to be unreasonably low."

The critical phrase in Section 3, as construed in Point I, is also sufficiently definite to enable courts and juries not only to identify the conduct proscribed by Congress but to impose criminal sanctions uniformly throughout the country according to rule. It does not render a statute unconstitutionally indefinite that its meaning is derived partly from its history and context. We develop this point immediately below (pp. 25–26). Nor is it unconstitutional to incorporate by reference a business standard generally known to the businessmen subject to the statute and ascertainable by judge and jury. This is a common and constitutional practice, as we show at pp. 26–30. And the business standard in question is sufficiently precise, at least as applied to sales below cost, to meet the most exacting constitutional test (see pp. 30–43).

A. THE MEANING OF A STATUTE MAY BE ASCERTAINED BY REFERENCE TO ITS HISTORY AND CONTEXT

We concede that a stranger well versed in the English language but utterly ignorant of American history and the evolution of antitrust law would have difficulty in determining the meanings of the relevant phrases in Section 3. The point of view from which the question of unreasonableness is to be judged, and also the relevant considerations, could hardly be determined by reading the words in a vacuum. However, once one looks to the history and legal context which reveal the function of the statute, the answers to those questions become plain. See pages 11-22 above.

The Fifth Amendment does not forbid using the history and legal context to ascertain the meaning of a criminal statute. Reliance on these familiar processes of interpretation has often been sustained in cases in which a statute was attacked as unconstitutionally vague. Thus, in *Nash* v. *United States*, 229 U.S. 373, 377, Mr. Justice Holmes indicated that one of the grounds for sustaining the Sherman Act against charges of unconstitutional indefiniteness was that the act took up the common law as to restraint of trade. In *American Tel. & Tel. Co.* v. *United States*, 299 U.S. 232, 246, the Court upheld a regulation prohibiting utilities from including more than "reasonable" charges in specified statements of account, violation of which was a criminal offense, on the ground that the term was amplified by the "context" of "good morals" and the well-known evils against which it was directed. Again in *United States* v. *Spector*, 343 U.S. 169, 170–171, the "statutory setting" revealed the

meaning of the words "timely" and "necessary," under a law penalizing wilful failure or refusal of an alien subject to a deportation order "to make timely application in good faith for travel or other documents necessary to his departure." See also *United States* v. *Harriss*, 347 U.S. 612. We know of no case in which the Court has even intimated that the due-process requirement that a statute give intelligible guidance to persons affected precludes reference to the statute's context in law and public policy.

B. A STATUTE MAY CONSTITUTIONALLY INCORPORATE BY REFERENCE A BUSINESS STANDARD FAMILIAR TO PERSONS AFFECTED BY THE LEGISLATION AND READILY ASCERTAINABLE BY JUDGE AND JURY

Legislatures necessarily use generic and inclusive terms to cover categories of proscribed behavior. The general terms must then be interpreted and applied both by the persons regulated and by the enforcing tribunals. Such a process is inherent in the limitations of language itself. It would be futile for the legislature to try to predict and prescribe a detailed rule for multifarious specific situations. And too rigid a rule would inevitably lead, by reason of failure to foresee all relevant circumstances, to greater arbitrariness than the use of a general and flexible test.

One familiar solution to this dilemma is to incorporate into the legislation the usages and standards of the relevant portion of the community. The constitutionality of this practice is beyond dispute. "The test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices."

Jordan v. *DeGeorge*, 341 U.S. 223, 231–232. In *United States* v. *Ragen*, 314 U.S. 513, the revenue act allowed deductions for "a reasonable allowance for salaries or other compensation for personal services," thus incorporating the standards of the business community; the Court rejected the argument that the statute was unconstitutionally vague, terming it a "negation of experience and common sense" (p. 524). In *Ratner* v. *California*, 321 U.S. 755, the State's motor vehicle code made the criminality of defendant's conduct depend upon whether he was driving at "unreasonable" speed, thereby adopting the general community standard of reasonableness. This Court held that an appeal attacking the statute as unconstitutionally vague did not even raise a substantial federal question. Other statutes have been sustained against attack for vagueness which use such terms as "reasonable" or "feasible" with reference to the circumstances and practices of particular industries. *Bandini Petroleum Co.* v. *Superior Court*, 284 U.S. 8, upheld a prohibition of "unreasonable" waste of natural gas enforceable by injunction, and found that the standard was sufficiently explained by conditions in the petroleum industry and matters of science and common knowledge. In *Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337, the Court upheld a criminal conviction for violation of an Interstate Commerce Commission order which prohibited; "so far as practicable, and where feasible," the transportation of explosives and poisonous gas "through congested thoroughfares, places where crowds are

assembled, street car tracks, tunnels, viaducts, and dangerous crossings" (p. 339); the relevant factors in determining guilt were the comparative merits of other routes as "both commercially practicable and appreciably safer" (p. 342). In *Sprotes* v. *Binford*, 286 U.S. 374, 389, a State statute was upheld which exempted from limits on truck length and weight any vehicles used to transport shipments from point of origin to a shipping terminal "by the shortest practicable route," since the phrase was given meaning by common usage and understanding. The principle is also squarely supported by *McGowan* v. *Maryland*, 366 U.S. 420, 428, which sustained a criminal Sunday closing law, which exempted sales of "merchandise essential to, or customarily sold at, or incidental to, the operation of" certain recreational enterprises. The Court pointed out that the applicability of the phrase could be easily comprehended by resort to "ordinary commercial knowledge" and the results obtainable from "a reasonable investigation" into the activities of "nearby" exempted business.

Appellees' argument, like the decision below, is predicated chiefly upon the verbal parallel between the words "unreasonably low prices" in Section 3 and the provision of the Lever Anti-Profiteering Act making it "unlawful * * * wilfully to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries," which was held unconstitutionally vague in *United States* v. *Cohen Grocery Co.*, 255 U.S. 81. The vice of that statute was not its use of the term "reasonableness" as such, but its failure to relate this rule of reason to any point of

view, and to a standard or practice discernible from either the historical background of the legislation or the common understanding of persons to whom it applied. The fatal fault was succinctly summarized in a subsequent decision under the Lever Act (*Small Co. v. American Sugar Refining Co.*, 267 U.S. 233, 240–241):

> * * * [T]here was no accepted and fairly stable commercial standard which could be regarded as impliedly taken up and adopted by the statute as this Court construed it. * * *

Mr. Justice VanDevanter went on to contrast a New York rent control law which had been upheld against constitutional attack saying that "[W]hat is just and reasonable between landlord and tenant in view of the value of property and the outlay which the owner must make for taxes and other current charges" were "matters which in the usual course of business come to be fairly well settled and understood." The New York statute presented a quite different case, the Justice concluded (pp. 241–242), because—

> * * * A standard thus developed and accepted in actual practice, when made the test of compliance with legislative commands or prohibitions, usually meets the requirement of due process of law in point of being sufficiently definite and intelligible.

The instant case falls in the latter category. The question of "unreasonableness," as we have shown, is to be judged from the standpoint of the seller. This fact also distinguishes *United States v. Trenton Potteries Co.*, 273 U.S. 392, 398, where Mr. Justice Stone

was speaking of the vagueness of the test of "reasonable prices" when one is left at large to consider all the divergent interests of which the community is composed. The statute in the present case takes up the standards of the business community by which to judge whether the seller, instead of behaving as an ordinary reasonable businessman, fixed a price, with intent to destroy competition or eliminate a competitor, which had no rational foundation in the seller's costs, or in the market conditions or other business exigencies of a kind that would be taken into consideration by ordinary businessmen in the same position. And since, as we show in the next section, these too are matters "which in the course of business [have] come to be fairly well settled and understood," Section 3, at least as applied in this case, "meets the requirement of due process of law in point of being sufficiently definite and intelligible" (*Small Co.* v. *American Sugar Refining Co.*, 267 U.S. at 241-242).

C. THE BUSINESS PRACTICES AND STANDARDS TAKEN UP BY SECTION 3 ARE SUFFICIENTLY ASCERTAINABLE AND DEFINITE, AT LEAST APPLIED AS TO SALES BELOW COST, TO SATISFY THE REQUIREMENTS OF THE FIFTH AMENDMENT

Custom and business understanding readily identify the factors that are to be taken into consideration in determining whether the seller fixed a price so low, with the specific intent to destroy competition or to eliminate a competitor, as to have no rational foundation in business conditions such as would be taken into consideration by ordinary businessmen, in the same position, lacking predatory intention. They include the seller's costs, both direct and indirect, the

opportunity to reduce unit costs by increasing volume, the quality and condition of his goods, the market price or the prices of his competitors, the ratio of profit to both gross sales and invested capital, an urgent need to liquidate inventory, and a host of similar considerations. The list of relevant factors and their relative importance will vary somewhat from industry to industry and even from case to case. The point is simply that the factors which a rational businessman would take into account are thoroughly familiar in the several segments of the business community. The businessman subject to the statute would feel no uncertainty about how to guide his conduct.

In practical operation the business firms governed by Section 3, and the judges and juries which must apply it, will not be determining the reasonableness of an initial price in a vacuum but will decide whether a firm dropped its prices unreasonably. The seller's previous prices and practices, as well as the prices and practices of other merchants in the same market, would be available for comparison; and the question would be whether there was no rational business explanation for the drop, other than the desire to destroy competition. In answering this question, as Judge Yankwich pointed out in *F. & A. Ice Cream Co.* v. *Arden Farms Co.*, 98 F. Supp. 180, 190, "additional elements other than those already mentioned, such as cost, usual profits and the like, would be available for consideration. Among them might be mentioned the suddenness of the price change, its relation to previous prices charged by the merchant or by others in the

field in the particular locality or elsewhere, the existence or non-existence of new economic factors relating to cost of production, demand for the article, seasonal or other, the consequent need for expansion or contraction of the field for the particular merchandise and other factors, financial or economic, which might or might not warrant a precipitate reduction in price."

The standard by which the reasonableness of the explanation for an unusually low price is to be judged is also that of the business community. And since it is only "unreasonably" low prices that statute proscribes, doubtful questions of degree are to be resolved in favor of the seller. He is to be acquitted unless his prices, made with a predatory intent, fell outside the range of what an ordinary businessman, acting as the seller, would consider reasonable under the same conditions.

This Court has consistently sustained the use of such terms as "reasonable" and "unreasonable" in criminal statutes where, as here, the understanding and practices of the relevant segment of the community will define the legal obligation, as applied to particular instances. In *United States* v. *Ragen*, 314 U.S. 513, 523, the Court said "[t]he mere fact that a penal statute is so framed as to require a jury upon occasion to determine a question of reasonableness is not sufficient to make it too vague to afford a practical guide to permissible conduct." Particularly pertinent is *Nash* v. *United States*, 229 U.S. 373, in which the Court upheld a conviction for conspiracy in restraint of trade and to

monopolize in violation of the Sherman Act over the contention that the statute was indefinite. See also *Miller* v. *Oregon*, 273 U.S. 657, sustaining a conviction for driving at a "dangerous" rate of speed; *Baudini Petroleum Co.* v. *Superior Court*, 284 U.S. 8, upholding a prohibition against "unreasonable" waste of natural gas; *Sproles* v. *Binford*, 286 U.S. 374, upholding a State statute regulating trucks on the highways with an exception for certain trips "by the shortest practicable route"; *American Tel. & Tel. Co.* v. *United States*, 299 U.S. 232, sustaining a regulation carrying criminal penalties for including more than "reasonable" charges in specified statements of account; *Ratner* v. *California*, 321 U.S. 755, sustaining a conviction for an offense involving driving a motor vehicle at "unreasonable speed"; *United States* v. *Lemer*, 143 F. 2d 298, sustaining a conviction of trading with one whom the defendant had "reasonable" cause to believe to be an enemy of the United States.

The cases relied upon by appellee are all distinguishable upon the same ground as *Cohen Grocery* and other Lever Act cases; in each "there was no accepted and fairly stable commercial standard which could be regarded as impliedly taken up and adopted by the statute, as this Court construed it" (*Small Co.* v. *American Sugar Refining Co.*, 267 U.S. 233, 240–241). There are also other distinctions. In *International Harvester Co.* v. *Kentucky*, 234 U.S. 216, the State antitrust law punishing combinations in restraint of trade where the purpose or effect was to fix a price in excess of the "market value under fair

competition, and under normal market conditions" (p. 221), was held unconstitutional because it required the defendants to "think away the principal facts of the case as it exists and say what would have been the price in an imaginary world" (p. 222). The opinion distinguishes *Nash* v. *United States*, 229 U.S. 373, upon the ground that the Sherman Act deals "with the actual, not with an imaginary condition other than the facts" (p. 223). The instant case also deals with actual market conditions; whether the defendant's price is unreasonably low depends upon his costs, his profits, his business problems and the market conditions actually facing him. The judgment is to be based upon prevailing practices and current facts well known to those affected.

Cline v. *Frink Dairy Co.*, 274 U.S. 445, is distinguishable upon similar grounds. Although the State law prohibiting conspiracies in restraint of trade was held invalid because it contained an exception for combinations whose purpose was to obtain "a reasonable profit," the vice was not merely the use of the term "reasonable" but, as stated at page 457–458 of the opinion, that the statute called for a forecast upon hypothetical events: "To compel defendants to guess on the peril of an indictment whether one or more of the restrictions of the statute will destroy all profit or reduce it below what would be reasonable, would tax the human ingenuity in much the same way as that which this Court refused to allow as a proper standard of criminality in *International Harvester Co.* v. *Kentucky*, 234 U.S. 216, 232, 233."

Since one member of the Court suggested during the oral argument of this case at the 1961 term that *Connally* v. *General Construction Co.*, 269 U.S. 385, where the Court invalidated a State law requiring payment of the "current rate of per diem wages in the locality", might be controlling in the instant case, we discuss the case at length, noting preliminarily that its vitality as the precedent is perhaps diminished by the change in judicial attitude towards minimum-wage laws and by several decades of experience under State and federal prevailing wage laws such as the Walsh-Healey and Davis-Bacon Acts. In our view the *Connally* decision is distinguishable upon two grounds.

First, the State law called upon certain employers to ascertain the "current wage rate" in the community for each classification of employees in situations in which one would frequently find not a single uniform rate for a classification but, at best, clusters of rates within a range. The purpose of such a law is to prevent the expenditure of public funds upon projects often let by competitive bidding from undermining the labor standards of the community. If the purpose of Section 3 of the Robinson-Patman Act were to assure the average retailer a margin between cost and selling price upon which he could operate at a profit, then Section 3 would require some general market-wide determination of an "unreasonably low price." But that is not the purpose of Section 3. See pp. 12–22 above. Section 3 is concerned with predatory pricing and the question whether the price is

"unreasonably low," unlike whether the wage is "prevailing" or "current," is to be determined not from the standpoint of the market generally but from the standpoint of the seller.

Second, although the term may be precise enough in economic theory, the current wage rate in a locality may be an utterly unintelligible standard for the actual operation of a business. It is easily applied in a locality where the hourly wage rate paid 90 percent of the journeymen electricians is $3.50, regardless of differences in skill, but a few marginal contractors are paying hourly rates of $3.25, $3.00 and even $2.85. The growth of labor unions has made this a common situation. It is not extraordinary even today, however, to find a wide spread of rates for employees in a single craft or classification. Thus, in our hypothetical community the rates might be:

	Percent
$3.50 an hour	5
$3.35 an hour	10
$3.25 an hour	25
$3.20 an hour	20
$3.10 an hour	10
$3.00 an hour	20
$2.90 an hour	5
$2.85 an hour	5

In the absence of an administrative finding or a customary definition of "current", a contractor could not possibly tell which was the current or prevailing rate. The opinion shows that this kind of problem did in fact confront the employer in the *Connally* case (269 U.S. at 393), and it must have been a common situation in Oklahoma in the mid-twenties. As the Court itself said, "the vice in the statute here lies in the impossibility of ascertaining, by any reasonable

test, that the legislature meant one thing rather than another, and in the futility of an attempt to apply a requirement, which assumes the existence of a rate of wages single in amount, to a rate in fact composed of a multitude of gradations" (269 U.S. at 394). There is no similar problem in determining whether a seller's prices are "unreasonably low" under Section 3. The test is whether they have no rational foundation in factors (*e.g.*, the seller's costs, or in the market conditions or other business exigencies facing the seller) of a kind which an ordinary businessman in the seller's situation, but lacking predatory intent, would take into consideration.

For the foregoing reasons we conclude that the relevant provisions of Section 3 are not so vague or indefinite as to violate the Fifth Amendment. Borderline cases may arise that present some difficulty, especially where the selling price is above the seller's costs and it is argued that the profit is too small for the price to be reasonable. This degree of uncertainty has never been thought to vitiate a criminal statute. As Mr. Justice Holmes stated, in upholding the constitutionality of criminal penalties for violation of the Sherman Act's prohibition of unreasonable restraints of trade, "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here, he may incur the penalty of death." *Nash* v. *United States*, 229 U.S. 373, 377. It is difficult to see how a more precise standard could

have been written. Cf. *United States* v. *Petrillo*, 332 U.S. 1.

In the present case, however, it is unnecessary to decide whether the understanding and practices of the business community taken up by Section 3 give the term "unreasonably low prices" a sufficiently definite meaning in every possible application. This is no borderline situation. Appellees are charged with selling at prices below their own costs of production. And the business community unanimously holds that under normal conditions prices must be high enough to cover costs and that a price below the seller's own costs is unreasonably low in the absence of some special justification. "* * * [I]t would ignore the economic facts of life to say that one in business for a profit would deliberately and consistently sell at a loss without some ulterior motive. It would be equally inadmissible to say that one who consistently sells at a loss without competitive compulsion is not selling at unreasonably low prices." *Ben Hur Coal Co.* v. *Wells*, 242 F. 2d 481, 486 (C.A. 10).

Selling below cost, in the absence of special circumstances, is explicable only as part of a campaign to destroy competition; and it inevitably will have that effect when practiced by a company of substantial resources. Small and weak concerns cannot hope to endure against a strong competitor who undertakes to sell at a loss. If such loss-selling is intended to stop price competition, the weak firms must either soon capitulate to the demands of the big competitor and

raise their prices, or go under. If it is intended to drive the weak firms out of business, the plan is almost certain to succeed if the predatory price-cutter has sufficient economic strength to outlast his weaker rivals. The need or opportunity to destroy competition cannot be invoked as a justification which makes a price below cost reasonable. On the contrary, it is plain from the proscription of sales at unreasonably low prices "for the purpose of destroying competition or eliminating a competitor" that this element of gain to the seller is not a permissible factor in judging the question of reasonableness. Indeed, the seller's predatory intent is the very core of the illegality.

Business accounts are kept to measure the profit and loss of operations, a computation requiring ascertainment of costs. The corporate books themselves are likely to be important evidence in showing that sales were made below cost. Here, the charge is that National "intentionally" sold below its cost. The indictment itself suggests, therefore, that proof will be taken from corporate documents of which National had specific knowledge. The same proof was relied on by Judge Learned Hand in *United States* v. *Corn Products Refining Co.*, 234 Fed. 964 (S.D.N.Y.), in upholding in a Sherman Act civil case a charge of selling at unreasonably low prices with a predatory purpose. In that case, the corporate accounts (p. 990) were supplemented by intracorporate communications showing management's contemporaneous understanding (p. 989), historic industry pricing patterns (pp.

988–989), and the expert opinion of those familiar with the industry (p. 991). Similarly, in upholding the constitutionality of Section 3, Judge Yankwich (who has had extensive experience assessing evidence in antitrust cases) pointed out that the problems of proof of cost, as well as of other pertinent factors, could be resolved by using "ordinary business and accountancy methods." *F. & A. Ice Cream Co.* v. *Arden Farms Co.*, 98 F. Supp. 180, 189 (S.D. Cal.).

Appellees' argument that " 'selling below cost' is a vague and indefinite standard" (Brief on Initial Argument, pp. 58–71) misses the point entirely. The government has never suggested either that Section 3 forbids all sales below cost or that any particular methods of cost accounting have special significance. Our position is that common usage and understanding are enough to inform the management of a business that selling at a loss (*i.e.*, below its own costs), constitutes selling at "unreasonably low prices" unless there are abnormal business circumstances which justify the losing operations. Section 3 gives plain evidence that the purpose to destroy competition is not a justification, but rather is the heart of the violation. All appellees had to do was to sell above cost, a normal business objective, or to justify losses by business exigencies other than the wish to injure competitors.

The application of this standard scarcely raises the refined problems of cost accounting which might require resolution in drafting or interpreting a rigid

prohibition against sales below cost.[1] Since Section 3 deals with "unreasonable" conduct, if the seller reasonably thinks that he is not incurring a loss on the sales, that is the end of the matter. Moreover, since Section 3 is aimed at predatory pricing, the overwhelming proportion of the cases that can be expected to arise will, like the present case, involve a drop in the price at which an established firm is selling a regular product. The seller's own books and established methods of accounting will therefore be available as evidence. A seller who drops his prices, without a nonpredatory reason, to a level which is below cost according to his own records and methods of cost accounting, is not conforming to the standards of the business community and his prices are "unreasonably low"; whereas if the sales are yielding a profit according to the seller's *bona fide* method of accounting, no inference of unreasonable pricing could be drawn merely from proof that, according to another method of accounting, he is selling at a loss.

To be sure, there are special situations in which sales below cost have a legitimate commercial justification. The price fixed by competition in the sale of the product may be below the costs of the particular

[1] Under State laws prohibiting sales below cost an accurate objective determination of costs would be essential. Such laws are collected and discussed in Clark, *Statutory Restrictions on Selling Below Cost*, 11 Vand. L. Rev. 105 (1957). It would also be essential if the Congress were to enact a similar law. This was one of the reasons for the Department of Justice's opposition to a federal law prohibiting sales below cost, and it apparently stimulated the Federal Trade Commission to propose a more exact definition. *Hearings before a Subcommittee of the House Committee on Interstate and Foreign Commerce on H.R. 10235*, 86th Cong., 2d Sess., pp. 4–5, 6, 7.

firm. Sales below cost may dispose of excess inventory, of obsolete or spoiling merchandise, or of merchandise in a line which the seller no longer wishes to produce or distribute; they may be made to introduce a new product or to break into a new market; or they may be designed to retain a customer by meeting in good faith the equally low price of a competitor. Under certain conditions a business firm might reasonably drop its price below its unit costs at the current volume of sales in the belief that the volume of sales could be so greatly increased as to reduce the unit price and secure a larger total profit. A firm might sell a byproduct or carry a minor line priced at less than its fully distributed costs where this would increase its net income from all sales. Other explanations may be rational in the circumstances of a particular case. One who sells at a loss, however, is departing from the norm. The circumstances which might make so low a price reasonable are readily identifiable. If none exists, the price below cost is "unreasonably low." In short, whatever room there may be for differences as to whether a price is "unreasonably low" because it does not yield a sufficient profit, in the absence of extraordinary circumstances there is none about sales below costs.

In sum, when Section 3 is read as a living directive addressed to the business community in a context of antitrust problems and policies, it conveys adequate warning to business firms that if they sell below cost for the purpose of destroying competition, they are committing a criminal offense. "[C]ommon usage and understanding" (*Boyce Motor Lines* v. *United States*, 342 U.S. 337, 340–341) are enough to inform

the management of a business that selling at a loss constitutes selling at "unreasonably low prices" unless there are abnormal business circumstances which justify the losing operations. Section 3 gives plain evidence that the purpose to destroy competition is not a justification, but rather is the heart of the violation. Thus, the avoidance of this plain violation of Section 3 was not beyond the "ready comprehension" (*United States* v. *Ragen*, 314 U.S. 513, 524) of National's management.

Determining appellees' guilt or innocence under the statute will be easily within the competence of judge and jury. Common understanding, together with prior experience in cases dealing with predatory price-cutting under other statutes, demonstrates that "sales below cost" and the possible justifications are susceptible to judicial proof, just as they are to a businessman's knowledge.

III

SINCE SECTION 3 IS CONSTITUTIONAL AS APPLIED TO THE SALES BELOW COST CHARGED IN THE INDICTMENT, THERE IS NO OCCASION TO CONSIDER ITS CONSTITUTIONALITY AS APPLIED TO OTHER SITUATIONS

It is a settled principle of constitutional adjudication that the Court will restrict its decision of constitutional questions to the facts before it—to the constitutionality of the statute *as applied to the litigant* and will refuse to determine the general validity of statutory provisions in the abstract, on the basis of their possible application to other situations. Since "[t]he delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases [that may be] imagined"

(*United States* v. *Raines*, 362 U.S. 17, 22), "[i]t has long been [this Court's] considered practice not * * * to decide any constitutional question except with reference to the particular facts to which it is to be applied." *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450, 461; *United Public Workers* v. *Mitchell*, 330 U.S. 75, 89–90. If the statute is constitutional as applied, the Court will not look beyond to peripheral cases which may pose more difficult constitutional problems. *Robinson* v. *United States*, 324 U.S. 282; *United States* v. *Fruehauf*, 365 U.S. 146, 157; *Barrows* v. *Jackson*, 346 U.S. 249, 257; *United States* v. *Harriss*, 347 U.S. 612, 618. The *United Public Workers* case, *supra*, illustrates the principle. There this Court upheld the prohibition in the Hatch Act against taking "any active part in political management or in political campaigns," as applied to the clear case of a ward executive committeeman and worker at the polls, but expressly refused to examine any further at that time into the validity of the general standard.

In the present case the counts laid under the Sherman Act charged a continuing conspiracy to restrain trade by fixing prices, by driving small firms from the market, and by fixing and maintaining differentials applicable to various kinds of sales of milk. The seven counts under the Robinson-Patman Act, with which we are now concerned, are exemplified by Count 2 on page 9 of the Record. Paragraph 22 charges that for a month in the summer of 1958 National Dairies—

> sold milk to its distributor in the Paola-Osawatomie, Kansas market at unreasonably low

> prices for the purpose of destroying competition in the Paola-Osawatomie, Kansas market in violation of Section 3 * * *.

Paragraph 23 particularizes the charge:

> * * * National utilized the advantages it possesses by reason of the fact that it operates in a great many different geographical localities in order to finance and subsidize a price war against small dairies selling milk in competition with it and its distributor in the Paola-Osawatomie, Kansas market by intentionally selling milk to its distributor Martin at prices below National's cost.

Thus, since the charge is that National violated Section 3 by selling at prices below its own costs for the purpose of destroying competition, there is no occasion for the Court to rule upon the definiteness of Section 3 as it might be applied in other situations. Appellees had ample warning that their conduct was illegal. They cannot be heard to complain because some other firm might have doubt about the impact of the statute upon some other line of conduct.

Appellees argued in their original brief (pp. 5–16) that the offenses charged in the indictment are not limited to sales below cost because paragraph 22 and the corresponding paragraphs in the other counts follow the words of the statute. But the particularization of the offense set forth in paragraph 23 plainly limits and qualifies the broader language of paragraph 22. Paragraph 23 makes it explicit that the sales at "unreasonably low prices" charged in this indictment are sales "at prices below National's cost." It is the two paragraphs together, the second limiting the first, that set forth the offense charged in Count Two.

"[T]he indictment must be read as a whole, not by sentences." *United States* v. *Minneapolis Electrical Contractors' Ass'n*, 99 F. Supp. 75, 78 (D. Minn.). The charging portion of the count explicitly sets forth the "Offense Charged" in two paragraphs under that heading, and not just in the statutory language used in the first paragraph. The "Effects" paragraph of the count, which immediately follows the two paragraphs setting forth the "Offense Charged," plainly refers to those two preceding paragraphs when it speaks of the effects of the "aforesaid offense." The two paragraphs of the charging portion of the count thus constitute the "plain, concise and definite written statement of the essential facts constituting the offense charged," which Rule 7(c) of the Federal Rules of Criminal Procedure requires the indictment to contain.[*]

This interpretation of the indictment is in accord with the rule that when various acts are alleged in a single count, "all of its recitations and averments must therefore be read and considered together." *Blackwood* v. *United States*, 138 F. 2d 461, 463 (C.A. 8); see, also, *McCoy* v. *United States*, 169 F. 2d 776, 780

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[*] Contrary to appellees' contention (Original Br. 8-9), government counsel did not state to the district court that "the indictment has a broader scope than below-cost sales." The colloquy upon which appellees rely, during which government counsel stated that an unreasonably low price "does not have to be below cost" (R. 125), related to the general scope of the statute, and not to the offense charged in this particular indictment. Indeed, appellees' counsel himself previously had recognized that "one argument that the Government makes is, certainly it is an unreasonably low price where a defendant charged under Section 3 sells below cost" (R. 95).

(C.A. 2), certiorari denied, 335 U.S. 898; *United States* v. *Shindler*, 173 F. Supp. 393, 395 (S.D.N.Y.). In the *Shindler* case, Count Two of the indictment charged a violation of Section 17(a)(2) of the Securities Act of 1933, "first, in the language of the statute [the defendant 'did unlawfully * * * obtain money * * * by means of an omission to state a material fact necessary to make the statements made, in the light of the circumstances under which they were made, not misleading'], and then by particularizing the acts complained of [having called the attention of the purchasers of stock to the price at which it was selling on the American Stock Exchange, 'but having omitted to state the material fact that said price of said stock had been caused to rise and had been prevented from falling by the said defendants * * *']." In refusing to dismiss this count, the court stated (p. 395, emphasis added): "By going beyond the statutory language with greater specificity the defendants are more fully informed of the crime charged, enabling them thereby to prepare their defense to meet the prosecution's case, and at the same time protected against double jeopardy. *The parts of the count must be read together.*"

Appellees' argument implicitly assumes that the government will not be limited at trial to proof of the acts specified in the second paragraph of each of the Robinson-Patman Act counts. Yet such a limitation would clearly be imposed if the specifications had been contained in a bill of particulars. *E.g., United States* v. *Neff*, 212 F. 2d 297, 309 (C.A. 3); *Land* v. *United States*, 177 F. 2d 346, 349 (C.A. 4); *Bergen*

v. *United States*, 175 F. 2d 223, 224 (C.A. 5); *Braatelien* v. *United States*, 147 F. 2d 888, 892 (C.A. 8); *United States* v. *Glasser*, 116 F. 2d 690, 702 (C.A. 7), modified on other grounds, 315 U.S. 60.* *A fortiori*, when the indictment itself particularizes the acts alleged to violate the statute, appellees can be convicted only if the specific acts charged are proven. Cf. *Stirone* v. *United States*, 361 U.S. 212.

Our contention that the only question is whether Section 3 is constitutional as applied to the conduct with which appellees are charged in the indictment is entirely consistent with the settled rule that if the challenged provision of the statute is itself so vague and uncertain as to be repugnant to due process, specification of the details of the offense in the indictment will not serve to validate the statute. "It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression." *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453. See also *Champlin Refining Co.* v. *Corporation Commission*, 286 U.S. 210, 242 (1932). We agree with appellees that it is the adequacy of the statute which must be tested. The difference between appellees and ourselves is that we believe that the statute is constitutional as applied to appellees, and that the judgment below should be reversed if the statute gave

*For the purposes of the Criminal Appeals Act, the particulars are to be considered as limiting the indictment, unless the district court has not so treated them. See *United States* v. *Lem Hoy*, 330 U.S. 724, 725, 730; *United States* v. *Halseth*, 342 U.S. 277, 278–279.

them adequate warning that their conduct (*i.e.*, selling at prices below cost without commercial justification, for the purpose of destroying competition) would render them liable to its penalties; whereas appellees contend, in effect, that, even though they had adequate warning from the statute that they were committing the proscribed offense, nevertheless the statute cannot constitutionally be applied because some other business firm might not be able to determine whether the statute applied to different conduct in a different situation. Appellees' contention is inconsistent with the historic course of constitutional adjudication. The same contention was specifically rejected in *Robinson* v. *United States*, 324 U.S. 282, the only case which raises the point squarely in relation to a claim of unconstitutional vagueness. In that case, when the defendant attacked the constitutionality of the federal kidnapping statute by arguing that its meaning was uncertain as applied to various hypothetical cases, the Court rejected the argument upon the ground that there was no uncertainty in the application of the statute to the defendant's conduct saying (p. 286)—

> We do not know what provision of law, Constitutional or statutory, gives us power wholly to nullify the clearly expressed purpose of Congress * * * because of a doubt as to the precise congressional purpose in regard to hypothetical cases that may never arise.

The contrary argument appears to rest upon a play upon words. Where a statute or municipal ordinance purports to regulate the exercise of the right to freedom of speech and the press, the Court has made an exception to the general principle and determined the constitutionality of the statute or ordinance "on its face" by examining its possible applications without confining the inquiry to the constitutionality of the statute as applied to the particular litigant. The reason is, "The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview." *Thornhill* v. *Alabama*, 310 U.S. 88, 97–98. See also *Hague* v. *C.I.O.*, 307 U.S. 496; *Lovell* v. *Griffin*, 303 U.S. 444. The Court has also spoken of examining the statute "on its face" in pointing out that whether a defendant had reasonable notice of what conduct would subject him to penalties depends upon the vagueness or certainty of the statute and not upon the degree of precision with which the indictment charges a crime. *E.g.*, *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453; *United States* v. *Spector*, 343 U.S. 169, 171. The two problems are dissimilar except in those instances in which the statute attacked as void for vagueness is in the area of First Amendment liberties. The reasons for the *Thornhill* doctrine have no application to economic regulation whether the statute be attacked for vagueness or another alleged defect.

Nothing in the Criminal Appeals Act requires a different conclusion. On direct appeals under the Act, the Court considers "the invalidity or construction" of the statute. In the latter instance it looks to the indictment and any bill of particulars in deciding whether the indictment charges a crime under the statute properly construed. By analogy it is entirely proper to look to the indictment and follow the normal rule of constitutional adjudication in passing upon the validity of the statute, *i.e.*, its validity as applied to the acts charged in the indictment. The construction put upon the indictment by the district court is conclusive (*United States* v. *Borden Co.*, 308 U.S. 188), but contrary to appellee's contention neither the prosecutor nor the district court put upon this indictment an interpretation contrary to the construction we now urge.

Since the proscription of sales at "unreasonably low prices" for the purpose of destroying competition in Section 3 of the Robinson-Patman Act gave appellees adequate warning that making sales at prices below cost, not with adequate commercial justification but for the purpose of destroying competition, would render them liable to the statutory penalties, their prosecution and conviction for engaging in such conduct cannot deprive *them* of liberty or property without due process of law, regardless of whether the statute can constitutionally be applied to predatory pricing in other forms.

CONCLUSION

The judgment of the district court dismissing counts 2, 4, 6, 8, 10, 13, and 15 should be reversed.

Respectfully submitted.

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